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No. 58710-2-1

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

SCOTT WINEBRENNER,

Petitioner/Appellant

v.

CITY OF SEATTLE,

Respondent/Appellee.

Petitioners ~~APPELLANT~~ S BRIEF

Damon A. Platis, WSBA#24719
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FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2007 MAR 19 PM 3:15

ORIGINAL

TABLE OF AUTHORITIES

RAP 10.1 (g) provides in pertinent part: "in cases consolidated for the purpose of review, a party may…file a separate brief and adopt by reference any part of the brief of another". Scott Winebrenner v. City of Seattle, Case #58710-2-I has been consolidated with City of Seattle v. Quezada, cause #58336-1 for argument and disposition.

Petitioner/Appellant Scott Winebrenner has filed a separate brief and adopts by reference the Table of Authorities section of the Respondent's brief filed by Attorney James Dixon on behalf of his client, Quezada.

TABLE OF CONTENTS

I. INTRODUCTION

Whether this Court should adopt the City's novel and erroneous interpretation of RCW 46.61. 5055, which causes a defendant to be routinely sentenced twice for a "second" DUI offense, instead of being punished once for a "first", and once for a "second" offense, which ignores the plain meaning of "prior offense", and produces "unlikely, absurd, or strained consequences"? NO.

II. ASSIGNMENTS OF ERROR

1. King County Superior Court Judge Joan DuBuque erred in reversing the trial court by construing RCW 46.61.5055 (12)(a)(v) and (12)(b) to include Winebrenner's 2005 reckless driving conviction (originally charged as DUI) as a "prior offense" within seven years for purposes of sentencing him subsequently in 2005 for a revoked deferred prosecution for DUI charge from 2001.

2. King County Superior Court Judge Joan DuBuque erred by failing to apply the rule of lenity in favor of Petitioner Winebrenner where RCW 46.61.5055(12)(a)(v) and (12)(b) construed together is subject to more than one interpretation under these circumstances.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether King County Superior Court Judge Joan DuBuque erroneously construed RCW 46.61.5055 (12)(a)(v) and RCW 46.61.5055 (12)(b) to cause Winebrenner to be sentenced twice for a second DUI offense, instead of being punished once for a first, and once for a second offense, which ignores the plain meaning of "prior offenses" under the statute, producing unintended, absurd and unfair consequences?

2. Whether King County Judge Joan DuBuque erred by failing to apply the rule of lenity in sentencing Winebrenner under the penalty schedule set forth in RCW 46.61.5055, where it is subject to more than one interpretation?

III. STATEMENT OF THE CASE

The Seattle Municipal Court granted Scott Winebrenner's petition for deferred prosecution on October 2, 2001 concerning a 1st offense DUI arrest that occurred in the City of Seattle on July 27, 2001. Winebrenner went through intensive outpatient treatment, and successfully completing the two year program. Unfortunately, on June 22, 2005, he was charged in Snohomish County District Court Evergreen Division with a 2nd DUI offense. The prosecutor

for the City of Snohomish, John Rodabaugh II eventually amended the DUI charge to reckless driving, and Scott entered a plea of guilty to reckless driving on December 9, 2005.

Following the December 9, 2005 guilty plea, Winebrenner appeared in Seattle Municipal Court on December 13, 2005 where he acknowledged that the Snohomish County District Court Evergreen Division conviction for reckless driving (originally charged as DUII) constituted a violation of his deferred prosecution. Pro Tem Judge Durham revoked the deferred prosecution and proceeded to sentencing. RP 6. Pro Tem Judge Durham correctly determined the 2001 DUI arrest that predated the 2005 DUI arrest constituted a 1st offense for sentencing purposes under RCW 46.61.5055 not a second offense, and Mr. Winebrenner received the mandatory minimum 2 days in jail and other standard DUI sentencing conditions for a 1st offense DUI refusal. RP 14.

On July 17, 2006, at the RALJ hearing, King County Superior Court Judge Joan DuBuque reversed the trial court decision, ruling Winebrenner's sentence based on the revoked deferred prosecution arising out of the 2001 DUI arrest ought to have been treated as a 2nd offense subject to the 45 day mandatory minimum jail term and 90 day EHM requirement and other sentencing condi-

tions under the statute. The superior court erroneously recognized that RCW 46.61.5055 required the court to consider "all offenses" in determining the mandatory minimum. Notwithstanding Winebrenner's argument that the legislature required the court to include only "prior" offenses, Judge DuBuque ignored the legislature's use of the word "prior" to modify "offense." Looking at the plain meaning of "prior" in connection with the other statutory language, the RALJ court failed to understand that a prior offense within seven years must mean that the arrest for the prior offense preceded in time the arrest for the current offense, and was within seven years of the current offense.

Here, Winebrenner's arrest for DUI in 2005 occurred After the 2001 DUI arrest on the current offense. Accordingly, the 2005 amended Reckless Driving conviction was not a "prior offense" that occurred within seven years of the current offense from 2001 since it did not precede it in time.

IV. ARGUMENT

The City's interpretation of RCW 46.61.5055, which ignores the statute's plain language and produces an absurd result, should be rejected.

1. Overview

The Washington legislature has created a sentencing scheme for defendants convicted of DUI, whereby each successive conviction results in a more severe mandatory penalty. For instance, a defendant convicted of a first DUI with a BAC of 1.5 or greater will face a minimum two days in jail for a first offense, 45 days for a second offense, and 120 days for a third. RCW 46.61.5055(1)-(3). Although the sentencing court may go above the mandatory minimum whenever the court believes it appropriate to do so, the court may not go below that minimum, except in very limited circumstances involving "extraordinary medical" necessity. RCW 46.61.5055(11).

In order to determine the mandatory minimum, the sentencing court must determine the number of qualifying convictions. RCW 46.61.5055(12)(a). In addition to actual convictions, that list includes previously granted deferred prosecutions, with the date on which the deferred prosecution was granted serving as the "conviction" date. Id; Kent v. Jenkins, 99 Wn. App. 287, 290, 992 P.2d 1045 (2000).

The City's appeal in this case raises an issue as to how the prior offenses are to be counted when a defendant is revoked on a

deferred prosecution based upon a new conviction. Under the City's creative interpretation of the sentencing statutes, instead of a first and second offense, as the law dictates, the court is *required* to impose much harsher penalties by treating both offenses as a second offense.

This becomes easier to understand when a typical scenario is considered. Assume a defendant is arrested and charged with his first DUI in 2000. He enters into a deferred prosecution. Four years later, in 2004, he is charged and convicted of the same offense. Under the applicable sentencing statute, the court must treat the earlier deferred prosecution as a "prior offense" for purposes of the mandatory minimum. This means that the 2004 offense is punished as a second offense, rather than a first. See RCW 46.61.5055(12)(a); Jenkins, supra, at 290.

The defendant is then revoked on his earlier 2000 deferred prosecution based on the new 2004 conviction. Under the trial court's understanding of the statute, this revoked deferred prosecution should be treated as his first offense, as the defendant has already been more harshly punished for a "second" DUI, the one which occurred in 2004. Because the 2004 offense was not com-

mitted prior to the 2000 DUI, it is not a prior offense. The result is the defendant is properly punished for a first and second offense.

Under the City's interpretation of the statute, however, there is no first offense in this scenario. Instead, the court is required to punish the defendant as if he committed two independent second offenses: the 2000 deferred prosecution is a "prior offense" for the 2004 DUI, and the 2004 DUI is then treated as prior offense for the 2000 DUI.

As set forth below, this novel interpretation is an unfair and strained reading of the statute, which ignores the plain language of the statute, and is contrary to the obvious intent of the legislature to promote proportionate punishment. Additionally, to the extent that the City's interpretation could be characterized as reasonable, it must be rejected under the rule of lenity.

2. Both the plain language and rules of statutory construction support the lower courts' rulings

The question presented by this case is a simple one: when the court sentences a defendant on a revoked deferred prosecution, must the court include all offenses or just prior offenses in determining the mandatory minimum? The City does not perceive a temporal limitation on which offenses must be counted, believing

that all convictions of the specified type—no mater when they occurred—must be included in the mandatory minimum. The trial court rejected the City's argument, recognizing that the legislature intended the word "prior" to modify "offenses."

The trial court's holding is well supported by the law. The legislature's use of the word "prior" cannot be ignored, as "each word of a statute is to be accorded meaning." State ex rel. Schillberg v. Barnett, 79 Wn.2d 578, 584, 488 P.2d 255 (1971). Under the City's interpretation, the legislature could have completely omitted the word "prior", and the statute would still have the same meaning. As such, the City's interpretation ignores one of the fundamental rules of statutory construction—that the legislature is "presumed to have used no superfluous words and [the court] must accord meaning, if possible, to every word in a statute." In re Recall of Pearsall-Stipek, 141 Wn.2d 756, 767, 10 P.3d 1034 (2000); see also, State v. Williams, 128 Wn.2d 341, 349, 908 P.2d 359 (1995) ("we are duty-bound to give meaning to every word that the Legislature chose to include in a statute and to avoid rendering any language superfluous.")

In the present case, the trial court relied upon the common understanding of the word "prior", read in context with the rest of

the statute, to conclude that the 2005 incident was not a prior offense to the 2001 deferred prosecution. See State v. Olson, 47 WA. App. 514, 516-17, 735 P.2d 1362 (1987) (statutory term may be given its dictionary meaning).

The City argues that the trial court improperly relied upon the common meaning of "prior" rather than the statutory definition contained in RCW 46.61.5055(12). This argument has some surface appeal, particularly given that this definitional section of the statute does refer to "prior offense." But upon closer examination, it is apparent that the statute does not attempt to define "prior." Instead, when read in context, the provision simply provides a laundry list of the various types of convictions and court proceedings that can constitute a prior offense for purposes of establishing the mandatory minimum. RCW 46.61.5055(12) provides:

> For purposes of this section:
> (a) A "prior offense" means any of the following:
> (i) A conviction for a violation of RCW 46.61.502 or an equivalent local ordinance;
> (ii) A conviction for a violation of RCW 46.61.504 or an equivalent local ordinance;
> (iii) A conviction for a violation of RCW 46.61.520 committed while under the influence of intoxicating liquor or any drug;
> (iv) A conviction for a violation of RCW 46.61.522 committed while under the influence of intoxicating liquor or any drug;

> (v) A conviction for a violation of RCW 46.61.5249, 46.61.500, or 9A.36.050 or an equivalent local ordinance, if the conviction is the result of a charge that was originally filed as a violation of RCW 46.61.502 or 46.61.504, or an equivalent local ordinance, or of RCW 46.61.520 or 46.61.522;
> (vi) An out-of-state conviction for a violation that would have been a violation of (a)(i), (ii), (iii), (iv), or (v) of this subsection if committed in this state;
> (vii) A deferred prosecution under chapter 10.05 RCW granted in a prosecution for a violation of RCW 46.61.502, 46.61.504, or an equivalent local ordinance; or
> (viii) A deferred prosecution under chapter 10.05 RCW granted in a prosecution for a violation of RCW 46.61.5249, or an equivalent local ordinance, if the charge under which the deferred prosecution was granted was originally filed as a violation of RCW 46.61.502 or 46.61.504, or an equivalent local ordinance, or of RCW 46.61.520 or 46.61.522; and
>
> (b) "Within seven years" means that the arrest for a prior offense occurred within seven years of the arrest for the current offense.

RCW 46.61.5055(12). The subsection does not seek to define "prior;" nor does it purport to remove the requirement that the offense occurred prior to the crime for which the defendant is being sentenced. It simply delineates what type of offenses should be considered by the court in determining the mandatory minimum.

The City also claims that the trial court failed to consider "prior offense" in context with other related statutes. According to the City, when read in context, "a 'prior offense' must occur prior to

sentencing—not other offenses." In other words, according to the City, the word "prior" serves to notify the sentencing court that it should not consider any offenses that occurred after the sentencing hearing. But this interpretation makes little sense, as the sentencing court could not possibly include an offense that occurred *after* the current sentencing. Under the City's reading, the word "prior" would not in any way restrict or modify "offense," so there would be no difference between "offense and "prior offense." As previously noted, a definition that renders a term meaningless violates the rules of statutory construction.

It is interesting to note that under the SRA, a "prior offense" does have the meaning suggested by the City. Within the context of the SRA, however, such an interpretation makes sense. Because the SRA differentiates between current and prior offenses, the term "prior offense" distinguishes those prior offenses from others. Outside the SRA, however, there is no such distinction. It is also significant to note that because the legislature employed a less common meaning to the word "prior" for purposes of the SRA, the legislature specifically defined that term. See RCW 9.94A.360(1) ("A prior conviction is a conviction which exists *before the date of sentencing* for the offense for which the offender score is being

computed.") The specific definition in the SRA stands in sharp contrast to the lack of any such definition in the DUI sentencing scheme.

The City is correct, however, that terms in a statute should be read in context with related provisions. See State v. Jacobs, 154 Wn.2d 596, 115 P.3d 281 (2005) ("The 'plain meaning' of a statutory provision is to be discerned from the ordinary meaning of the language at issue, as well as from the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.)

Here, reading the statutes in context, such a reading further supports the trial court's conclusion that the focus is upon the date of the arrest in determining what constitutes a prior offense. For instance, in determining whether a prior offense has washed-out, the court is directed to look at the time that has passed between the *date of the arrest* for the prior offense and *the date of arrest* for the current offense. See RCW 46.61.5055(12)(b) ("Within seven years" means that the arrest for a prior offense occurred within seven years of the arrest for the current offense."). It is significant that the focus is not upon the date of the conviction or sentencing, but upon the date of arrest. This supports the trial court's determi-

nation that when determining legislative intent behind the word "prior', the unit of measurement employed by the legislature is the arrest date.

One of the primary tenets of statutory construction: courts should "avoid readings of statutes that result in unlikely, absurd, or strained consequences." Advanced Silicon Materials v. Grant County, 156 Wn.2d 84, 90, 124 P.3d 294 (2005). The City's reading of the statute, where a defendant is punished twice for second offenses rather than a first and a second, produces exactly that—an unlikely, absurd, and strained consequence.

As the Washington Supreme Court has explained, "In undertaking this plain language analysis, the court must remain careful to avoid 'unlikely, absurd or strained' results." Berrocal v. Fernandez, 155 Wn.2d 585, 590, 121 P.3d 82 (2005) (citations omitted). Accordingly, "[w]e give words used in the statute their plain meaning, but we construe the statute to effect its purpose and avoid '[u]nlikely, absurd or strained consequences resulting from a literal reading.'" State v. Mannering, 112 Wn. App. 268, 272, 48 P.3d 367 (2002) (citations omitted).

Here, the purpose of the statute is to provide a proportionate sentence, with a first offense receiving less than a second offense,

and a second offense receiving less than a third. The City's interpretation of the statute, in addition to producing a strained and unlikely result, fails completely in this goal of proportionality. Under the City's reading of the statute, a judge would be required to punish a defendant twice for second offenses, without ever punishing a defendant for a first offense. Because this is contrary to the legislative intent of proportionality, it must be rejected. Pacific Sound Resources v. Burlington Northern Santa Fe 130 Wn. App. 926, 935, 125 P.3d 981(2005) ("We interpret statutes to effectuate legislative intent.")

On appeal, the City attempts to turn this argument around and argues that the trial court ruling produces an absurd result because it permits a defendant to avoid higher penalties by pleading guilty in reverse order. As a practical matter, it is doubtful there are many cases in which a defendant has multiple pending DUIs and is allowed to pick what order he will plead guilty. Far more common is the situation where a defendant will face a revocation hearing on a deferred prosecution based on a new conviction.

But putting aside the improbability of the concern expressed by the City, there is a mechanism for correcting any unfairness resulting from a defendant pleading guilty to multiple offenses in re-

verse order. If the statute produces a mandatory minimum that is too lenient, the court can always impose a higher sentence. By contrast, under the City's interpretation, if the statute requires both convictions to be treated as second offenses, the sentencing court has no mechanism to correct that inequitable result. Because this is a strained and illogical result that flies in the face of the legislative goal of proportionality, it must be rejected.

In State v. Whitaker, 112 Wn.2d 341, 771 P.2d 332 (1989), the Washington Supreme Court was confronted with a similarly strained result as that presented by the City's argument in the current case. The court in that case addressed a situation where sentencing had been deferred on a vehicular manslaughter and Whitaker placed on probation in 1981. The state subsequently moved to revoke the deferred sentence. In the interim, Whitaker had been convicted of a 1986 offense. The state argued the 1986 offense would count in the 1981 offender score. Whitaker, at 342-43. The state made this argument based on the new SRA language that specifically required the court to count all offenses existing on the date of sentencing. RCW 9.94A.360(1).

The question presented in Whitaker was whether the sentencing court could turn back the clock and consider the 1986 con-

viction a "prior conviction" in determining the appropriate sentence for the 1981 offense. The Supreme Court rejected the state's position, reasoning:

> To hold otherwise would be illogical, because the 1981 offense had already been counted as a prior conviction served, for purposes of fixing the 1986 minimum term, and then later, the 1986 offense would be counted as a prior conviction, for purposes of fixing the 1981 minimum term. That is, each offense would be treated as a prior conviction to the other.

Whitaker, at 346.

What is notable in Whitaker is that the Supreme Court was confronted with statutory language in the SRA that specifically required the court to consider all convictions that existed as of the date of sentencing. Whitaker, at 344; RCW 9.9A.360(1). But even then, the Court was unwilling to interpret the interplay of statutes in a way that would permit this illogical result. The Whitaker court determined that the appropriate solution for cases involving revoked deferred sentences and mandatory minimums under the SRA, was to treat the date the conditions of probation were initially imposed (which is the day the deferred was granted) as the "date of sentencing" for purposes of determining the mandatory minimum. In that way, offenses that were committed after the defendant entered into the deferred, would not be included in the mandatory minimum if

the deferred sentence was later revoked. Whitaker, at 345-47.[1] See also State v. Elgin, 118 Wn.2d 551, 555, 825 P.2d 314 (1992) (the "spirit or purpose of an enactment should prevail over the express but inept wording.")

The concerns presented by a deferred sentence apply with equal force to deferred prosecutions. For purposes of subsequent convictions, the day the court granted the deferred prosecution is considered the conviction date. But the sentencing date on a revoked deferred prosecution usually occurs at a much later time after new offenses have occurred. Thus, if the City were correct that "prior offenses" included all offenses existing as of the date of sentencing, then both the revoked deferred prosecution and the new offense would each count against each other as a "prior offense." This would produce the "illogical" result that the Whitaker court refused to permit.

Fortunately, unlike in Whitaker, this Court is not presented with a statute that specifically requires the lower court to include all offenses existing at the time of sentencing. Accordingly, this Court need not craft a special rule for deferred prosecutions, such as

[1] Because the SRA eliminated deferred sentences, this was a transitory problem. Subsequent cases have limited the holding in Whitaker to revocation matters (*See* State v. Collicott, 118 Wn.2d 649, 665 827 P.2d 263 (1992)), similar to what is present in the current case.

what the Whitaker court did for deferred sentences. Instead, this Court can avoid that same illogical and strained result by interpreting RCW 46.61.5055 in the commonsense manner employed by Pro Tem Judge Elsa Durham of the Seattle Municipal Court.

As discussed above, the City's interpretation of the statute should be rejected as it ignores the word "prior" and produces absurd, strained or unlikely consequences. But even if there was a legitimate question as to the meaning of "prior", the City's interpretation could not overcome the rule of lenity.

Where more than one interpretation of a statute is possible, the rule of lenity requires the statute to be interpreted most favorably to the defendant. State v. Gore, 101 Wn.2d 481, 485-86, 681 P.2d 227 (1984). ("Where two possible constructions are permissible, the rule of lenity requires us to construe the statute strictly against the State in favor of the accused.") The rule of lenity applies with equal force to sentencing statutes. See State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005).

In Jacobs, the trial court believed that the applicable statute required the defendant's sentencing enhancements to run consecutive to each other. Division Two of the Court of Appeals reached the same conclusion, and affirmed the consecutive enhancements.

The Washington Supreme Court accepted review. The defense argued that the statute was not clear, and that the rule of lenity applied, while the State argued that allowing the sentences to run concurrently would "render meaningless the purposes the legislature intended for one of the enhancements." Id. at 602. While cognizant of the State's concern, the Supreme Court held that because evidence of the legislature's intent did "not conclusively resolve the issue," the rule of lenity required the sentences to run concurrent. Id. at 603-04.

In the present case, the legislative intent should be clear: the legislature did not intend the strained result advocated by the City. As such, it is plain that the statute must be interpreted to look at the timing of the offenses. But even assuming there was some ambiguity as to this plain reading of the statute and as to the legislative intent, the rule of lenity would require this Court to reject the City's interpretation and reverse the superior court.

V. CONCLUSION

Judge DuBuque incorrectly interpreted the statute and should have affirmed Judge Pro Tem Elsa Durham's construction of the DUI sentencing statute RCW 46.61.5055. Unfortunately, Judge DuBuque reversed her which was an erroneous and absurd deci-

sion leading to a unfair and unjust result for appellant. Judge Du-Buque must be reversed. Because the 2005 reckless driving could not be a "prior offense" for the 2001 deferred prosecution, the trial court was not required to count it when calculating the mandatory minimum sentence. Appellant Scott Winebrenner respectfully requests Court of Appeals Div. I to reverse the superior court's unfair and erroneous decision.

Dated this 19th day of March, 2007.

DAMON A. PLATIS, WSBA 24719
Attorney for Appellant/Petitioner Scott Winebrenner

APPENDIX A

DEFENCE COPY

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Law Offices of
Harry Platis, Paul Ryals
and Damon Platis

SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF KING

City of Seattle, Appellant,

vs.

Scott Winebrenner, Respondent

NO. 06-1-01129-1 SEA

DECISION ON RALJ APPEAL

CLERK'S ACTION REQUIRED

This appeal came on regularly for oral argument on July 17, 2006 pursuant to RALJ 8.3, before the undersigned Judge of the above entitled court and after reviewing the record on appeal and considering the written and oral argument of the parties, the court holds the following:

Reasoning Regarding Assignment of Error: the trial court erred by failing to construe RCW 46.61.5055 and RCW 46.61.513 to require all "prior offenses within seven years" to include his conviction for Reckless Driving (amended from DUI) and the grant of the prior DP on the DUI. Both prior offenses are properly part of this sentencing and the matter is remanded for resentencing to the appropriate sentence.

IT IS HEREBY ORDERED that the above cause is:

[ ] AFFIRMED; [X] REVERSED; [ ] MODIFIED;

COSTS TBD (to be filed).

REMANDED to Seattle Municipal Court for further proceedings, in accordance with the above decision and that the Superior Court Clerk is directed to release any bonds to the Lower Court after assessing statutory Clerk's fees and costs.

DATED: 7/17/06

JUDGE

Counsel for Appellant

Counsel for Respondent

APPENDIX B

ORIGINAL

IN THE SEATTLE MUNICIPAL COURT

KING COUNTY, STATE OF WASHINGTON

CITY OF SEATTLE, Plaintiff, vs. SCOTT WINEBRENNER, Defendant.	No. 406313 RALJ No. 06-1-01129-1 SEA

VERBATIM TRANSCRIPT OF PROCEEDINGS

OF

A HEARING

BEFORE THE HONORABLE ELSA DURHAM (JUDGE PRO TEM)

12/13/2005

APPEARANCES

For Plaintiff City: Derek Smith

For Defendant Winebrenner: Not Identified

Also Present: N/A

Transcribed at the Request of the Seattle City Attorney

Transcribed by Brian Killgore

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(Proceedings of 12/13/2005)

MR. SMITH: Scott Winebrenner. Case 406313.

Mr. Winebrenner is here on a charge of DUI. He is currently on a deferred prosecution. Mr. Winebrenner incurred a new charge of DUI that was amended to reckless driving sometime earlier this year, and at this time the City is moving to revoke the deferred prosecution.

DEFENSE ATTORNEY: Your Honor, that is correct. There was a disposition on the new charge recently on December 9. The DUI charge out of Snohomish County District Court was amended to reckless driving. That was done recently, your Honor.

We understand the alleged violations and we would agree that those have occurred and we would ask the Court to impose some type of mandatory minimum sentence when the deferred prosecution is revoked by the Court. We know the Court has the authority by statute to do that.

The concern I have, though, is that the basis for the disposition with the city of Snohomish on the new charge was that they were looking at that new DUI as a second offense, with this being the first offense. We were hoping that this court would impose a mandatory minimum sentence based on a first offense on this charge, if in fact -- because this case predates the second charge.

So I understand counsel's position that he believes this case here is the second offense and that the case out of Snohomish is

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the first offense, so we will leave it to the Court's discretion.

THE COURT: How was it treated in Snohomish? You said it was treated there as a second?

DEFENSE ATTORNEY: That is correct. We had a 90 day -- the disposition was 90 days EHM. The prosecutor waived the 45 days straight jail time and offered 90 days of EHM. That's what he has to serve.

Your Honor, may I approach and show you the disposition?

THE COURT: Okay, show it --

MR. SMITH: I've seen it, your Honor.

THE COURT: You've seen it?

DEFENSE ATTORNEY: May I approach, your Honor?

THE COURT: This is from Snohomish County?

DEFENSE ATTORNEY: Yes, it is, your Honor.

THE COURT: The reckless?

DEFENSE ATTORNEY: Right.

THE COURT: Okay. Okay, thank you.

DEFENSE ATTORNEY: Thank you, your Honor.

THE COURT: Okay, so I need to see the court file on this matter.

(Pause in Proceedings)

THE COURT: Okay, I do find based upon the new criminal law violation that the charge of DUI, which was amended to reckless to which he has pled guilty and had a disposition in Snohomish County District Court, that that is a violation of the deferred

prosecution, and I will revoke the deferred prosecution which was entered into on October 1 -- October 2, 2001, and this is on case number 406313. In conjunction with that I have reviewed -- this was a refusal so I have reviewed the entire police report, including the field sobriety tests and the narrative of the officer.

The Seattle Police Department incident number 01355714, which was attached and incorporated by reference into the deferred prosecution matter -- that is a part of the file, and I do find that there are sufficient facts for a finding of guilty to driving while under the influence.

Okay, so having established that, we need to establish -- does the City want to say anything about whether this is a first or a second?

MR. SMITH: Your Honor, it is the City's position that statutorily this is a second offense. If your Honor would review the statute, the --

THE COURT: Do you have the statute with you that says this would be a second offense?

MR. SMITH: I don't have it with me, but I mean I just -- if your Honor wants us to, we can find the statute. The statute says that at the time of sentencing you do the calculations, not at the time of the offense, so it is -- the calculation occurs when sentencing occurs and at this point there are two offenses when sentencing is occurring, not at the time offense date

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occurred.

THE COURT: What statute is that?

MR. SMITH: The DUI statute.

THE COURT: Well specifically --

MR. SMITH: It is 1061 50 55, probably subsection --

THE COURT: Can we find that? Do we have it?

MR. SMITH: I don't know if we have any of the books. What books do we have?

THE COURT: We have -- which one?

MR. SMITH: It is in --

THE COURT: Okay.

DEFENSE ATTORNEY: Just for the record, can I say something, your Honor?

THE COURT: Sure.

DEFENSE ATTORNEY: For the record, I would disagree that this is a second offense. I've never seen it this way when a case predated --

THE COURT: That's --

MR. SMITH: This ends at 10 --

THE COURT: It ends at 10?

MR. SMITH: Yeah.

THE COURT: The other one started at 12? So RCW 46 --

MR. SMITH: Yeah, 46.

THE COURT: Counsel, I'm really more familiar with the way that you have counted it, is that first in line -- that this

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would be considered the first.

DEFENSE ATTORNEY: That's right. Otherwise it would be an absurd result. I don't -- the prosecutor in this case treats it -- their case as the second offense -- if that's why they've made the offer, you know, based upon second offense -- if they treated this case as a first offense.

THE COURT: Yeah.

DEFENSE ATTORNEY: You know? And --

MR. SMITH: It is RCW 46.61.5055 -- it is subsection B (2), which occurs -- where it says second offense. I'm sorry, it is subsection 2(B) and it describes that a person who is convicted of a violation who has no prior offenses, so basically the conviction occurs today, and has no prior offenses for seven years, which is not the case -- so we go to a person who has been convicted of a violation and who has one prior offense within seven years shall be punished as follows --

THE COURT: Yeah. Yeah, but -- okay, that doesn't really answer my question.

MR. SMITH: Within the -- within seven years means that the arrest for a prior offense occurred within seven years of the date of the arrest of the current offense, so the calculation does not occur -- the seven years, since it is within seven years -- the statute is very clear about what occurred. This is a second offense. There's no way that anybody can argue that it is not within seven years and it occurs at the time of the

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sentencing, so it's the time of conviction --

THE COURT: Well, that's the issue. You're saying -- you are making an assertion which I do not --

MR. SMITH: Well, your Honor, I think that it's obvious that the conviction occurs today because that's when the conviction occurs -- since there's no way you can say the conviction occurred in 2001, which would be the only other date we could be calculating this as.

The sentencing was continued. There was no sentencing --

THE COURT: Okay.

MR. SMITH: The sentencing took place today. It's within seven years -- within seven years of today's date there's a prior offense and this occurred in 2005.

THE COURT: Okay. Well, I don't know that I agree with that interpretation of the statute in this particular matter, and since it was considered the second in Snohomish County --

MR. SMITH: No, it wasn't considered a second offense.

DEFENSE ATTORNEY: Yeah, it was.

MR. SMITH: Your Honor, I would just point this out, that a second offense in -- if it occurred, would be three days of jail time and be followed by 60 days of electronic home monitoring.

DEFENSE ATTORNEY: That's not what he got.

MR. SMITH: I understand that's not what he got --

DEFENSE ATTORNEY: Wait, wait a minute. Can I say something? The basis of the offer by Mr. --

MR. SMITH: Your Honor --

DEFENSE ATTORNEY: Will I get a chance to respond?

MR. SMITH: Your Honor, it is the City's position that the basis of an offer by a party that's not here is not something that is something that we can bring before the Court since the City is going to have no way of testing it other than getting Mr. Rodabaugh here.

THE COURT: Okay. I will hear from counsel. Go ahead.

DEFENSE ATTORNEY: Your Honor, I am not trying to be disrespectful of counsel or anybody, but my position was this: He was offered -- now if we were going to trial on this case in Snohomish at Evergreen District Court, this is being treated as a second offense. That's what we were concerned about going to trial and trying to cut some kind of a deal.

The deal that was offered by Mr. Rodabaugh was taking into account that this -- his case was a second offense. The mandatory minimums on a refusal for second is 45 days incarceration, plus 90 days of electronic home monitoring.

He decided to give this guy a break because he had gone through deferred, he had gone through treatment, he had finished it, and he waived the 45 days straight time and imposed 90 days of straight EHM. That was what he had done, and at all times he contemplated that this was a second offense. Had it gone to trial and we had lost, we definitely would have been -- the sentencing would have been on a second offense.

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And so that's all I'm saying to the Court. Those representations are true. I have no reason to mislead this court or you, Counsel. That's exactly what happened.

MR. SMITH: Well, your Honor, I don't disagree with what -- the problem is that this is statutory construction and a mandatory minimum. Defense counsel is correct in that if he was convicted of a DUI in Snohomish County, it would be considered a second offense -- because of the way the calculation occurs and it's treated as a second offense, but it is a question of what the statutory construction reads.

The statutory construction would have been correct. What defense counsel probably should have done is come here, had this case revoked, had this be treated as a first offense, and then go to Snohomish County to whatever resolution occurs there. He didn't, and that didn't occur, but that's not -- the statute reads at the time of conviction whether or not he has priors within seven years.

1In this case within seven years, clearly, and nobody can say any different, there is a conviction for DUI -- a second offense. The DUI was reduced to reckless driving, which under our law is a second offense.

It is the City's position that the Court would have to completely disregard the statute to do that.

Now if the Court wants to do that, then it is the City's position that the statute reads as set in black-and-white, pretty

much clear as crystal -- you know, defense counsel is arguing for some different thing based on his negotiation of a plea deal in Snohomish County, which is not found anywhere in the statute, and these are mandatory minimums, so I just don't know what else to argue, and I don't want to argue about it anymore other than --

THE COURT: Good because, as I said, Counsel, I have always treated these as first offenses when they have come up like this, and I am going to treat this as a first offense in this case -- a first offense refusal, which it is in this matter.

DEFENSE ATTORNEY: Thank you, your Honor.

THE COURT: So now before we proceed any further, Mr. Winebrenner, do you understand what is going on here?

DEFENDANT WINEBRENNER: Yes, I do.

THE COURT: Okay, so before we go any further -- we are getting ready to sentence you on the DUI from -- actually from 2001.

DEFENDANT WINEBRENNER: Right.

THE COURT: Which I have revoked the deferred prosecution because of the subsequent matter up in Snohomish County, and I will hear anything else from the City on the recommendation.

MR. SMITH: Your Honor, the City is recommending 45 days in jail, followed by 90 days electronic home monitoring, with a $1200 fine, followed by the $125 BAC fee, and followed by conditions of a relapse prevention program and comply with the condition of an alcohol evaluation. I haven't seen anything

subsequent so I don't know what happened out of Snohomish County to indicate what the situation is there, but he certainly needs to get back into a relapse prevention program.

He's done the victims' panel, so I'm not going to ask that that be required. Basically give him credit for that.

He needs to have an ignition interlock for at least one year from today's date. No refusals, no law violations, no driving without license and insurance, no alcohol related offenses, and at this point since whatever happened was an alcohol related offense that occurred, the City is going to ask for a condition of abstinence. The City is going to ask for monitoring by probation and report to probation within 36 hours of release from custody.

THE COURT: Okay.

DEFENSE ATTORNEY: Your Honor, we would ask that the Court impose the mandatory minimums for a first offense refusal.

Mr. Winebrenner will be evaluated. He is in the process of getting another evaluation. He did complete the program at ABC -- that's my understanding.

He has since -- he has been abstaining now for --

DEFENDANT WINEBRENNER: Yeah, I have a sponsor, your Honor. I've been working the program since January 5 of this year. I did relapse after I got out of the program and -- I mean it was --

THE COURT: After the Snohomish County incident?

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DEFENDANT WINEBRENNER: No.

THE COURT: Okay.

DEFENSE ATTORNEY: And you also work -- you have a full-time job in Bellevue; is that correct?

DEFENDANT WINEBRENNER: Yes. I'm going to lose my job. I've been there 12 years. If I lose my job, I won't be able to afford all of these fines or do any of the stuff. I mean I'll just --

DEFENSE ATTORNEY: Mr. Winebrenner wants to cooperate, your Honor, with anything you recommend.

THE COURT: Okay. How long has he been in jail right now? How long have you been in here?

DEFENDANT WINEBRENNER: Well, I went to get my home monitoring in Everett --

THE COURT: Yes?

DEFENDANT WINEBRENNER: -- yesterday morning at 8 a.m. -- I was required to be there and I showed up on time. They said you have a warrant out, and I'm like, Oh, for what? And the next thing I knew --

THE COURT: So they took you into custody and shipped you down here?

DEFENDANT WINEBRENNER: Yes.

THE CLERK: Since the 12th, your Honor.

THE COURT: Since the 12th? Okay.

DEFENDANT WINEBRENNER: Yeah.

THE COURT: Okay. Okay, anything else, Counsel?

MR. SMITH: No, your Honor.

THE COURT: Would you like to say anything before I proceed to sentencing?

DEFENDANT WINEBRENNER: All right, I'm just going to apologize to the Court, your Honor. I am ashamed to be here today and I would like to let you know that I'm doing a good job of abstaining, and I do have a sponsor, and I'm on my ninth step, so things are getting better in my personal life, but I apologize for being here today. That's all.

THE COURT: Okay, thank you.

And does somebody have a judgment and sentence, Mr. Smith?

MR. SMITH: I have one.

THE COURT: Do you have a judgment and sentence?

MR. SMITH: Do you want to fill it out or --

THE COURT: No, you can --

MR. SMITH: Okay.

THE COURT: I just want to make sure that we have -- and where do you work, Mr. Winebrenner?

DEFENDANT WINEBRENNER: I work at Great Floors, which is formerly Carpet Exchange in Bellevue, Washington. I've been there for 12 years.

THE COURT: You've been there for 12 years?

DEFENDANT WINEBRENNER: Um-hum.

THE COURT: Okay.

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DEFENDANT WINEBRENNER: A lot of these things he's asking for, the prosecutor, are redundant because they are things I'm already doing or that are part of --

THE COURT: Okay. What is today, the 13th?

DEFENSE ATTORNEY: Yes.

THE COURT: What was the date of the Snohomish --

DEFENSE ATTORNEY: June 22.

THE COURT: June --

DEFENSE ATTORNEY: The date of the offense, you mean?

THE COURT: Yeah, the day of the -- June 22?

DEFENSE ATTORNEY: Of `05.

THE COURT: Of `05. Okay. Okay.

All right, the Court is going to impose the following, and as I said, I am taking this as a first, not a second in this particular -- in the context of the two events.

The Court is going to impose 365 days in jail, 362 days -- 363 days suspended. I am going to impose a $5,000 fine, $4500 suspended for a period of five years on the following conditions: In addition to the jail time, I am going to impose 30 days of EHM, which will take him through the holidays in this case -- electronic home monitoring with the alcohol sensor on it, and I am also going to impose -- there's a total of $1078 in fees and fines. Part of that will be $125 BAC. If you've paid that already in the deferred prosecution, you need not pay it in this one. I will give you credit for it in this one.

DEFENDANT WINEBRENNER: Thank you.

THE COURT: Okay, and he is to have no criminal law violations. He cannot drive without a valid license and insurance. He is to -- I am going to order him to have an evaluation as to the type of treatment that he needs, but it sounds like he needs some relapse treatment since Snohomish County, if he hasn't already gotten that. I am going to order him into alcohol treatment.

Has he completed the victims' panel, I'm not going to reorder the victims' panel in this particular case. I am going to order that he consume no alcohol and have no alcohol or related offenses or infractions, and I am also going to -- that means that when I order that he cannot refuse to take a BAC or a blood alcohol, that's a -- not in this particular case, not a .08, but it is a .00 -- because he's been ordered not to -- to maintain abstinence.

He is to complete any recommendation on the treatment program for the alcohol treatment and he is to have an ignition interlock for a period of one year.

And have I overlooked anything?

MR. SMITH: Calibrated to 00, your Honor.

THE COURT: Pardon?

MR. SMITH: You indicated that it was calibrated to 00.

THE COURT: 00, yeah.

MR. SMITH: And report to probation within 36 hours?

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THE COURT: Report to probation within 36 hours of this.

DEFENDANT WINEBRENNER: Okay.

THE COURT: So the electronic home monitoring will allow him to maintain his job and report to his work.

DEFENDANT WINEBRENNER: Great.

THE COURT: But he will need to get on that, and I would like to see him get through the holidays. I know it happened last June, but --

MR. SMITH: 60 months' jurisdiction?

THE COURT: Yes, five years.

DEFENSE ATTORNEY: Five years.

THE CLERK: Your Honor?

THE COURT: Pardon?

(Brief Pause in Proceedings)

THE COURT: Okay. And he'll get credit for the two days in jail.

DEFENSE ATTORNEY: Okay, thank you, your Honor.

THE COURT: Yeah, credit for time served. So that takes care of the two days. He should be released -- but is he still on electronic home monitoring? No, he's not.

DEFENSE ATTORNEY: No.

THE COURT: Yeah. Just for here. Okay. Yeah, from here.

MR. SMITH: Your Honor, I am handing defense counsel a copy of his notice of appellate rights and his CR LJ 7.2B. I ask that defense counsel acknowledge receipt and waive formal reading.

THE COURT: Okay, and Mr. Winebrenner, since the Court did find that you were guilty on this DUI, you do have a right to appeal. You must appeal within 30 days of today or you give up that right forever.

If you cannot afford an attorney, one may be appointed for you at no expense to yourself, and if you cannot afford to have the record transcribed and you qualify as indigent, that may be provided, also, at no expense.

There are other important rights, which have been given to your counsel, and I urge your counsel to go over those with you and you go over those with your counsel so that you understand your rights to appeal. Do you acknowledge that, sir?

DEFENDANT WINEBRENNER: Yes.

THE COURT: Okay.

DEFENSE ATTORNEY: Your Honor, we will acknowledge receipt of the advice of appellate rights, and I will -- we will waive formal reading of these, and I will go over that with him.

THE COURT: Okay. And I've informed him of partial, but not all of his rights.

DEFENSE ATTORNEY: Certainly, your Honor.

THE COURT: Okay. Thank you.

THE CLERK: Your Honor, is the 30 days an enhanced penalty?

THE COURT: Pardon?

THE CLERK: Is the 30 days EHM the enhanced penalty?

MR. SMITH: No.

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THE COURT: No, it's just imposed by the Court, given the circumstances here -- as part of the judgment.

THE CLERK: So two days in jail plus 30 days?

THE COURT: No, 30 days is in lieu of the two days, if I were to do that, but what I did was I did the two days plus the 30.

DEFENSE ATTORNEY: May I approach, your Honor?

THE COURT: Certainly. As part of the sentencing in this matter due to all of the circumstances.

THE CLERK: So, your Honor, you're saying two days --

THE COURT: The mandatory minimum is two days in jail and I'm giving him credit for the 12th and the 13th, so he's done the mandatory minimum on the -- according to the judgment and sentence. In addition to that I imposed 30 days of electronic home monitoring.

THE CLERK: But yet you had said that's not required by --

THE COURT: That is not required.

THE CLERK: So is it --

THE COURT: It still qualifies as subtracting from the total judgment, I believe. EHM qualifies in that category.

MR. SMITH: So it should be 330 --

(End of recording for 12/13/2006)

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C E R T I F I C A T E

I, Brian Killgore, do hereby certify:

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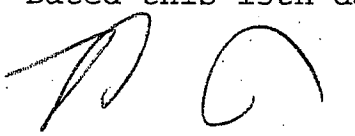
Dated this 15th day of March 2006.



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Notary Public in and for the
State of Washington,
Residing at Seattle.

My commission expires 11/1/2008

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION I

SCOTT WINEBRENNER, Petitioner, v. CITY OF SEATTLE, Respondent.	Court of Appeals No.: 58710-2-I King Co.Sup. Ct. No.:06-1-01129-1 SEA **CERTIFICATE OF SERVICE**

The undersigned certifies under penalty of perjury under the laws of the State of Washington the following the following is true and correct:

I am a citizen of the United States of America, over eighteen years of age and competent to be a witness herein. That on the 19th day of March, 2007, I forwarded by ABC legal messenger, a true and correct copy of the affixed Appellant's Brief with attachments To the following:

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And an original and one true copy of Appellant's Brief with attachments to:

2. Clerk of the Court
Court of Appeals, Div. I

3. Scott Winebrenner
Appellant

DATED this 19th day of March, 2007.

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